In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-1551

DELOY C. ROSS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Western District of Louisiana, petitioner was convicted on five counts of willfully attempting to evade and defeat his individual income taxes for the years 1966 through 1968, and the income taxes of Ross Investments, Inc., for the years 1968 and 1969, in violation of 26 U.S.C. 7201. Petitioner was sentenced to concurrent three-year terms of imprisonment of four of the counts and fined $10,000 on each of those four counts. The court suspended the imposition of sentence on the remaining count and placed petitioner on three years' probation. The court of appeals affirmed (Pet. App. A).

The case was tried by use of the net worth method, and the proof showed total unreported income of more than $344,000, of which $229,000 was attributed to petitioner, and $115,000 to Ross Investments, Inc. (Tr. 892, 902, 914, 917, 923). Petitioner's principal defense was that during

the prosecution years he had received gifts of several hundred thousand dollars in cash from his father, who had died in 1969. However, the evidence showed that during the period from 1952 through 1968, petitioner's father earned only $149,000 (Tr. 929-930), an average of $8,800 per year. Of this amount, petitioner's father left $91,000 in the partnership business known as W.C. Ross & Son, in which petitioner and his father were partners, to purchase assets, and the father withdrew $57,000 to live on and to pay his income taxes (Tr. 930).

1. Petitioner first contends (Pet. 13-17) that the government improperly obtained the partnership records of W. C. Ross & Son from William Taylor, who had stolen them. However, the evidence showed that Taylor did not steal the records in question. To the contrary, he had a substantial proprietary interest in the partnership records and maintained custody and control of them with petitioner's knowledge and consent. Until 1968, the W. C. Ross & Son partnership was operated by petitioner and his father. In 1968, petitioner and his father sold the business to William Taylor, a stepbrother to petitioner, and several boxes containing the partnership records remained on the business premises (Pet. App. 2a; Tr. 1802). Thus, as the purchaser of the partnership business, Taylor had a legitimate interest in its records. Moreover, since Taylor's mother was Mrs. W. C. Ross, the widow of petitioner's father, Taylor also had a proprietary interest in the records in his capacity as an heir to his mother's estate. (See Articles 884 and 888, Louisiana Statutes Annotated, Civil Code (1952).)

Finally, petitioner knew of and consented to Taylor's status as custodian of the records (Tr. 1795). The evidence showed that in May 1969, petitioner went to Taylor's store and removed only part of the records for the years 1965

through 1967, for inspection by the Internal Revenue Service (Tr. 1773). The partnership records included bank statements, profit and loss statements, copies of petitioner's and his father's income tax returns, and other business records (Tr. 1794). In September 1970, Taylor took the remaining partnership records to an attorney in order to investigate his claims against his mother's estate (Pet. App. 2a; Tr. 1811-1814). In March 1971, Taylor retrieved some of these partnership records and turned them over to Internal Revenue Service agents, in response to their request (Pet. App. 2a). The agents received the remaining partnership records, consisting of three boxes, directly from the attorney, with Taylor's permission (*ibid.*; Tr. 1822-1824). In mid-1971, petitioner realized that the partnership records were no longer in the store (Tr. 1800). However, from that time until the time of trial in June 1974, petitioner made no attempt to locate either Taylor or the records (Tr. 1805). Indeed, when the government introduced the portions of the partnership records into evidence, petitioner's counsel not only did not object but stipulated that they all "came from Mr. Walter [*sic*] Taylor, the natural son of Mrs. W. C. Ross" (Tr. 813).

Since petitioner made no pretrial motion to suppress these records or any objection to their introduction at trial, he had no basis to complain on appeal about the circumstances of their acquisition by the government. At all events, there is no merit to his claim. Not only did Taylor have a joint ownership interest in the records with petitioner, but he also had petitioner's permission to have the custody and control of them. Thus, Taylor's consent to hand over the documents to the government agents was sufficient to justify the government's use of them. *United States* v. *Matlock*, 415 U.S. 164, 170, 171; *Frazier* v. *Cupp*, 394 U.S. 731, 740; *Couch* v. *United States*, 409 U.S. 322, 328,

331-332, n. 14. See also *Bellis* v. *United States*, 417 U.S. 85, 97-100. Under these circumstances, the court of appeals correctly concluded (Pet. App. 13a) that "[t]he manner in which the records were acquired from Taylor was * * * entirely proper" because "they were undertaken with the consent of Taylor and his attorney."

2. Petitioner further argues (Pet. 8-12) that the government's failure to turn over the partnership records to him for his pretrial inspection was reversible error. Before trial, petitioner filed a broad motion for discovery of all documents which the government intended to use as evidence in the case, as well as all documents obtained from or belonging to him. The district court granted this motion, and the government turned over to petitioner a set of computations and data sheets used to reconstruct petitioner's income by the net worth method (Pet. App. 3a). The government turned over no other documents, and petitioner did not renew his request for any additional documents. As the court of appeals pointed out (*id.* at 8a), the "only point on which the disputed [partnership] records were relevant was whether Ross' father had sufficient income to be able to make the cash gifts that were the basis of one of Ross' defenses." But as the court of appeals further noted (*ibid.*), petitioner's own accountant testified that copies of the partnership's profit and loss statements were customarily maintained in his office. Thus, petitioner's failure to receive copies of the reports did not interfere with his defense, especially since he did not dispute the amount of income attributed to his father by the government's evidence.

Moreover, petitioner evinced a total lack of interest in the documents in question until after some of them were introduced at trial (see Pet. App. 8a-9a). Although petitioner was aware that the partnership records stored at his stepbrother's place of business included the profit and loss statements, he made no motion to suppress this evidence

until after the jury's verdict was received (*id.* at 5a). Under these circumstances, the court of appeals correctly held that there was "no abuse of discretion in the trial court's refusal to grant a new trial on grounds of noncompliance with its discovery order" (*id.* at 11a).

3. Finally, petitioner urges (Pet. 11) that the partnership records not introduced into evidence may have contained some exculpatory material that he was entitled to inspect. The partnership records not offered in evidence consisted of bank statements, copies of petitioner's and his father's income tax returns, and other documents supporting the profit and loss statements (Govt. Exs. 238 through 261), such as checks, check stubs and invoices (Tr. 396-463, 1794). The profit and loss statements were thoroughly discussed and their method of preparation was explained in detail during the testimony of the accountant who prepared them (Tr. 396-463). The supporting documents which were not introduced into evidence were kept in three large boxes and examined by the trial judge over the course of an entire morning, and not for 30 minutes as petitioner now claims (Pet. 11) for the first time. After this examination, the trial judge concluded that the documents contained no exculpatory material (Pet. App. 12a). Since the profit and loss statements were not exculpatory, but indeed tended to support the government's case, it is obvious that the corollary and supporting documents behind the profit and loss statements were also not exculpatory. Accordingly, the court of appeals correctly held (*id.* at 11a-12a) that *Brady* v. *Maryland*, 373 U.S. 83, upon which petitioner relied below, had no application.

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

AUGUST 1975.